REMOTENESS OF CHARITABLE GIFTS ONCE MORE.

I.

THE question whether property can be transferred beyond certain periods, in a certain event, from one charity to another charity, does not in itself seem to be of very great interest. If the people permit a charitable gift to be exempted from the operation of the rule against remoteness, if the property of charity is not subject to the usual limitations which public policy has placed upon the property of the individual, if it is as it were withdrawn from the avenues of trade by the charitable gift, what difference does it make to the public whether or not the property passes, in a certain event, from charity to charity, indefinitely? Hence it seems as if the question, in these busy times, was not really of much moment; but I am sure this is not the case, and I feel under no obligation to crave the forbearance of my readers in bringing this subject to their attention once more. That it needs no apologetic introduction is apparent from the decision in In re Tyler,[1] where the Court of Appeals felt bound by Christ's Hospital *v.* Granger to hold valid the following disposal of property: £42,000 to the London Missionary Society, committing to the said society the keys of the family vault, the same to be kept in good repair; "failing to comply with this request, the money left to go to the Blue Coat School." Upon this decision Professor Gray comments as follows: "Yet see to what this leads. A. gives $200,000 to Harvard College, on condition that, on the first day of January in each year, it pays $5,000 to the then heir of the body of A., and if it fails to do so, then the fund to go to Yale College. The gift over to Yale College is, according to Christ's Hospital *v.* Granger and In re Tyler, perfectly good; and so long as not charged on any particular fund, there is nothing illegal in paying $5,000 to the heir of the body of A. on the first day of January. But is not such an arrangement against public policy? Which is the sounder view of the Rule against Perpetui-

[1] 3 Ch. 252.

ties, — that which condemns or which sanctions such a scheme?" Professor Gray condemns the construction which supports Christ's Hospital *v.* Granger and In re Tyler, whilst I find that Mr. Jabez Fox sanctions it.

In the sixth volume of the HARVARD LAW REVIEW, page 195, Mr. Fox thinks: —

The Rule against Perpetuities is only aimed at preventing the non-alienation of property.

In the seventh volume of the same REVIEW, page 406, Professor Gray, on the contrary, says: —

The true object of the rule is to restrain the creation of future conditional interests.

In other words, Mr. Fox is of the opinion that the rule does not apply to inalienable interests, whilst Professor Gray feels quite confident that it does so apply. The issue here is clearly defined, and it ought not to be difficult to determine who is right.

Professor Gray cites Vice-Chancellor Stuart, in Avern *v.* Lloyd,[1] and Mr. Justice Fry in Birmingham Coal Co. *v.* Cartwright,[2] as rendering decisions which support Mr. Fox; but he adds, that "these two cases are instances where two exceptionally able judges have been misled by the incomplete form in which former courts had declared a doctrine, and in consequence making decisions which had to be overruled," the first *in terms*, in In re Hargreaves,[3] and the second *expressly*, in London & S. W. R. R. Co. *v.* Gomm.[4]

The question upon which Mr. Fox and Professor Gray have very courteously "agreed to disagree," is involved in a gift to charity, that is, Is the true doctrine in the Rule against Perpetuities set forth in Christ's Hospital *v.* Granger?[5] In this case, Lord Cottenham held that a limitation over from one charity to another charity is good, without regard to its remoteness. He said: "These rules are to prevent property from being 'inalienable' beyond a certain period," and that this effect is not produced by the transfer, in a certain event, of property from one charity to another. Mr. Fox thinks that Lord Cottenham used the word "inalienable" in its narrowest possible sense, and hence Mr. Fox is enabled, very naturally, to deduce the following as the true province of the rule: to prevent property from being so disposed of that it cannot,

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[1] L. R. 5 Eq. 383.
[2] 11 Ch D. 421.
[3] 43 Ch. D. 401.
[4] 20 Ch. D. 562.
[5] 1 McN. & G. 460.

within a certain period, be conveyed by a good title. But I cannot think it possible that Lord Cottenham used the word "inalienable" in such a narrow way, thus confining the rule within such meagre limits, rendering it of little practical value, and defeating what seems to me its *raison d'être.* It is true, of course, the rule incidentally does prevent property being rendered "inalienable," but this it accomplishes simply through the fact that, were it not for the rule, remote future interests could be created, but, as these interests cannot be created, the property must be "alienable" within the limits of the rule.

The right of alienation is, of course, involved, if the right is understood to mean that the one having the present interest has the power to exercise the right, and to do as he may see fit with the proceeds. The one object of the rule is, of course, to prevent the *tying up of property*, to use Mr. Fox's words, and I can quite agree with him if by "tying up" Mr. Fox means the property cannot be alienated and the proceeds disposed of in any way it may be desired by those having a present interest within the limits of the rule. Mr. Fox does not mean this, — if he does, he agrees with Professor Gray. It seems to me that in not one of Mr. Fox's cited cases is the question of the right of alienation directly involved. The words "perpetuity" and "inalienable" were considered from the standpoint of a postponement of a vested interest: it is a perpetuity unless it vests absolutely within the limits of the rule; it is a perpetuity unless there is a vested interest which can alienate absolutely, within the limits of the rule. Of course, giving property in perpetuity, *in perpetuum*, is giving it forever, and if property is given forever it cannot be "alienated" from that purpose. Now, the rule is to prevent a "perpetuity" in the sense of the giving of property to one object or purpose forever; the rule is also to prevent the making of an "inalienable" gift; for a gift if a perpetuity is "inalienable," and if "inalienable" it is a "perpetuity."

I have always thought, and Mr. Fox's citations have strengthened my opinion, that the rule was intended to subserve the public policy of fixing a limit beyond which one's disposal of one's property shall cease; in other words, public policy intends that after a certain time one's property shall not be tied up, — that it must pass free and untrammelled to some one who can employ it in any way this some one may choose; if property can be tied up beyond the limits fixed by the rule, it would be a colossal check

upon progress and enterprise. In short, there must be a fee interest in some one within a certain fixed time. Of course, an estate tail, or any destructible estate, is not bad. Clearly, Lord Cottenham used the word "inalienable" in this broader sense. The ability to make title to property — technically, to alienate — is a very different thing. As said in Winsor *v.* Mills,[1] "The possibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation," and with this I am quite sure Lord Cottenham would have agreed.

It seems clear to me that Lord Cottenham, when he said, "These rules are to prevent property from being inalienable beyond a certain period," was reasoning in this way: a charitable gift is in itself a perpetuity, being a gift *in perpetuum;* it therefore, of course, renders the subject of the gift "inalienable." Now, as this effect of *inalienability* is produced by the gift itself, the rule is not involved, because the rule is intended to prevent that which a gift to a charity permits; or, again, the property is already "inalienable" by the fact of its being given to charity; therefore the rule cannot apply, for if it did, there could be no such thing as a gift to charity. Reasoning in this way, he very readily might have said, "These rules are to prevent property from being 'inalienable' beyond a certain period."

Surely the fact that the charity may not alienate the subject of the gift is not the important characteristic of a charitable gift, using the word "alienate" in its strict technical sense; on the contrary, is it not rather the fact, that by reason of the public good charity is permitted to hold property *in perpetuum?* Charity may be the permanent and final beneficiary of a gift; the property may be literally given to it forever. A charity is the only object of which this may be said; one cannot provide for a complete and perfect disposal of property forever, save by giving it to charity. Now, is not this quality of the gift its chief characteristic, and is it not fair to assume that Lord Cottenham, when thinking of a charitable gift, was recalling this highest attribute of it, and that he used the word "inalienable" whilst recalling the fact that there was no future disposal of the property, for it was given to charity forever? It was "inalienable" not *necessarily* in the sense that the charity could not make a good title, but rather in the sense that the fund, or the property, or the proceeds of the property,

[1] 157 Mass. 362, 365, 366.

must always be held for the charitable purposes. The charity ownership was qualified; it could never deal with the property as an individual owner in fee could deal with his own property, hence in this higher sense the property was "inalienable." In a gift of $100,000 of personal property to charity, whether in money, in stock, or in bond, cannot the charity dispose of (alienate) the bond or stock, and make a good title thereto? but, on the contrary, is it not the chief characteristic of this gift that the money, stock, or bond is *still* an "inalienable" gift, in that it is given in perpetuity, and the charity cannot dispose of the fund in any way it may see fit? As for myself, I have not a doubt that, in speaking of a gift to charity, I could use, as Lord Cottenham used, the word "inalienable," and mean exactly what I have said above; and I feel quite sure, if my readers will only ask themselves the question, they will find that they too, very readily, could use the word in the way I think Lord Cottenham has done.

It seems absurd to me to make the rule depend on the possibility of being able to make a conveyance, and I cannot believe that Lord Cottenham understood the rule in any such way. He uses the word "inalienable," it may be, perhaps, carelessly, but he never meant to confine the word to its strict technical meaning; and this, I think, for the reason that *the mere lack of power of alienation, in the sense of the right to make title, is one of the minor characteristics of the rule*, whilst its chief characteristic consists in the lack of the power of alienation, in the sense of the right of complete disposal, whether the gift consists of money, stock, bond, or land.

II.

Lord Cottenham, whilst using the word "inalienable," as I have just explained, and whilst perfectly familiar with the principle in the rule, yet, as frequently happens with all of us, has erred in applying the principle in Christ's Hospital *v.* Granger. I think it may be seen from his own words how he has been led astray: "If the Corporation of Reading might hold the property for certain charities in Reading, why may not the Corporation of London hold it for the Charity of Christ's Hospital in London?" And he thought it could, because the property is not rendered "inalienable" by the transfer, in a certain event, of property from one charity to another. He reasoned in this way: As a charity may be created to exist forever, so property may be given to it *in*

perpetuity; hence, in a charity an "alienable right," in the sense of a perfect ownership, can never exist; therefore the property is, as it were, out of the avenues of trade, and there is no reason why one charity may not succeed another. But this reasoning is not sound. Whilst it is true that a charity may never have an "alienable" right, in the sense of an absolute, unfettered ownership, yet it is also true that a charity should have, and must have, a right to its property within its own charitable limitations. In other words, as Professor Gray very aptly says, "The remote future interest is objectionable, because the law does not allow an interest so uncertain in value to hamper the present ownership." The charity — within the limitation of the devise being to it in perpetuity — must hold the property as free from future limitations as must the individual. The charity should have all the rights of ownership, save the right to divert the fund from the charitable purpose. Because the charity may hold property in perpetuity is no reason why the gift should not be subject to all the other rules of law. It may hold it in perpetuity, but it must hold, within this limitation, as free as an individual must hold. The law permits property to be given to charity by reason of the public good accomplished by charity.

The rule which governs the *vesting* of a charitable gift is the same which governs the *vesting* of a gift to an individual: it cannot be created to commence at a future time beyond the limits of the rule. Now, why is not the charitable gift equally subject to every other rule applicable to a gift to an individual? Giving property to charity forever is one thing. Making it a qualified ownership in this respect, *e. g.*, that it must always be used for the benefit of a certain object, is all right, of course; but this is as far as the law will interfere with an absolute ownership; no other possible exemption, etc. has been extended to charity. In all other respects, the gift must be governed as would any other gift; hence, to make it go over on a remote condition is as bad in the case of a charity as it would be in the case of an individual; there must be a vested right to deal with the property as any other owner could — save that it is given to an object forever. With this single limitation, then, the gift to charity must not be hampered by any remote future interests.

It seems from Lord Cottenham's words, already quoted, that his error was this: he knew that a charity can receive a gift in perpetuity, *in perpetuum*, therefore he asks, What difference does

it make if it goes over from one charity to another? But this reasoning of course is solely from the point of view of public policy: the public had no interest in it, the property was withdrawn from the avenues of trade, as it were, therefore why could not another charity succeed to it? and from the standpoint of public policy relative to charities, this was perfectly sound. Lord Cottenham thought: The rule requires the charitable gift to vest within the proper limits, but after it has once so vested there it remains, devoted to charity forever. Now, having vested in charity forever, why cannot it pass from one to another? If it is a charity, it is for the public good, and is it not immaterial what charity it is for? are they not all equally for the public good?

But the vice of the above reasoning, as I have already said, is this: the charity itself has rights, and when public policy granted to it the right to hold property in perpetuity, it altered no common law right of property; it simply extended to it the privilege of holding property forever, but it in no way curtailed the common law way in which that property should be held, save that it must be held for the charity forever. There is no reason why the charity should not hold as the individual, and anything which interferes with the gift to the individual, which is void as transgressing the rule, should apply equally to the gift to charity.

Let me briefly summarize what I have said: —

(1.) Lord Cottenham did not use the word "inalienable" in the narrow sense of the mere inability to make title to property, but rather in the broader sense of the fact that it was devoted forever to charity; it was "inalienable" in the sense that it was outside the avenues of trade, it was different from any other gift, it was "inalienable" in the sense that it was given to one object — as no other gift could be given — forever. This was a perfectly natural meaning of the word, on Lord Cottenham's part, as he had in his mind *the* chief characteristic, rather than *a* minor characteristic of a charitable gift. Surely every one will admit that the most important feature of a charitable gift is the fact that the property may be given to it *in perpetuum*, and that it is a minor characteristic that the charity may not alienate the subject of the gift. In a gift of $100,000 to charity, the question of "inalienation" is not at all involved in the sense of inability to make title, whilst, on the contrary, it is deeply involved in the sense of the inability to appropriate the $100,000, or, even if the gift consists of land, to appropriate it or its proceeds to any other purpose than to the

charity forever. The $100,000 is clearly "inalienable" in this sense; if it is not, and if charity can use the gift for any other purpose, then money cannot be given to charity.

(2.) Lord Cottenham erred in deciding that property can be transferred, beyond certain periods, in a certain event, from one charity to another charity. He reasoned in this way: he knew that a gift can be made to charity in perpetuity; therefore, he thought, what difference does it make if it goes over, on the happening of a certain event, from one charity to another? From the point of view of public policy — the public has no interest in it — the property is, as it were, withdrawn from the avenues of trade; therefore why cannot another charity succeed to it? And from the standpoint of public policy Lord Cottenham was perfectly sound. But the vice of his reasoning is this: he regards the question solely from the point of view of the public policy, which permitted a gift to charity to remain forever afterwards devoted to the charitable purpose, but he did not recall the fact that the only alteration which public policy makes in the common law is that the property may forever remain devoted to the one purpose, but public policy in no way curtails the common law way in which that property should be held; the charity has its rights, and there is no reason why it should not hold as the individual holds. The rule as to the vesting of the gift is quite the same in both the charitable and the individual gift; they both must vest within the proper limits; then, after vesting, why should not the same rule continue to be applied to both, always excepting the fact that the future of the charitable gift is determined forever? But this feature of the gift is really quite similar to the gift to the individual in fee, because they are both a *final* disposition of the property, — the fee to the individual, the fee to the charity, — only one is possibly of longer duration than the other, as the life of the charity may be longer than that of the individual, but both are equally final dispositions. Now, why, in the case of an individual, does public policy demand that the absolute power of doing as one wishes with property shall vest within a certain period? I do not mean to enter the field of economic discussion, but the answer of course is, that this freedom of ownership tends to the advancement of the individual and to the encouragement of enterprise; if no one ever had the freedom of ownership, the creation of wealth would be at its lowest point. Hence, in the case of the individual, the law provides that the freedom of owner-

ship shall vest within a certain limit, and in not applying this rule to charity Lord Cottenham erred. The fact that the property remains in the charity forever is no reason why the rule should not apply. The gift to the charity should be regarded *at any one moment*, as the gift to the individual is regarded; in the latter, the rule does not permit a future interest so remote and uncertain in value to hamper a present ownership, and it is quite clear, on principle and authority, that the same rule should apply to the charitable gift. If a fund given to charity can, at some very distant period of time, be taken from that charity, then the healthy and natural growth of that charity is just as much checked as would be the growth of the individual under similar conditions. The law has said this shall not take place in the case of the individual, and the logic and consistency of the law demand that the charity shall be governed by the same rule.

In conclusion, I will add that it may be urged against my argument that it consists simply of an attempt to explain the meaning of Lord Cottenham's words. I am willing to plead guilty to this indictment, for is it not, in a great measure, the life-work of us lawyers to explain the meaning of our judges, — to seek exactly their use of words, — to distinguish or apply, to extend or qualify just what they have said, — in short, to reconcile, and if possible always to reconcile, their words with the principle involved?

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